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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 DANNY RAVEN,
8

2:13-cv-01901-JCM-VCF

9 *Plaintiff,*

ORDER

10 vs.

11 ROBERT BANNISTER, *et al.*,

12 *Defendants.*
13

14 This *pro se* prisoner civil rights action by a Nevada state inmate comes before the court
15 for initial review of the complaint under 28 U.S.C. § 1915A and on plaintiff's motion (#3) for
16 appointment of counsel. The court defers action on the pauper application at this time.

17 ***Screening***

18 When a "prisoner seeks redress from a governmental entity or officer or employee of
19 a governmental entity," the court must "identify cognizable claims or dismiss the complaint,
20 or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a
21 claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who
22 is immune from such relief." 28 U.S.C. § 1915A(b).

23 In considering whether the plaintiff has stated a claim upon which relief can be granted,
24 all material factual allegations in the complaint are accepted as true for purposes of initial
25 review and are to be construed in the light most favorable to the plaintiff. *See, e.g., Russell*
26 *v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions
27 unsupported by any actual allegations of fact are not assumed to be true in reviewing the
28 complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-81 (2009). That is, conclusory assertions that

1 constitute merely formulaic recitations of the elements of a cause of action and that are
 2 devoid of further factual enhancement are not accepted as true and do not state a claim for
 3 relief. *Id.*

4 Further, the factual allegations must state a plausible claim for relief, meaning that the
 5 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

6 [A] complaint must contain sufficient factual matter, accepted as
 7 true, to “state a claim to relief that is plausible on its face.” [*Bell*
 8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).] A claim
 9 has facial plausibility when the plaintiff pleads factual content that
 10 allows the court to draw the reasonable inference that the
 11 defendant is liable for the misconduct alleged. *Id.*, at 556
 12 The plausibility standard is not akin to a “probability requirement,”
 13 but it asks for more than a sheer possibility that a defendant has
 14 acted unlawfully. *Ibid.* Where a complaint pleads facts that are
 15 “merely consistent with” a defendant’s liability, it “stops short of
 16 the line between possibility and plausibility of ‘entitlement to
 17 relief.’” *Id.*, at 557 . . . (brackets omitted).

18 . . . [W]here the well-pleaded facts do not permit the court to infer
 19 more than the mere possibility of misconduct, the complaint has
 20 alleged - but it has not “show[n]” - “that the pleader is entitled to
 21 relief.” Fed. Rule Civ. Proc. 8(a)(2).

22 *Iqbal*, 556 U.S. at 678.

23 Allegations of a *pro se* complainant are held to less stringent standards than formal
 24 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

25 In the present case, plaintiff Danny Raven presents a number of claims based upon
 26 nurses at High Desert State Prison (“High Desert”) allegedly having given him improperly high
 27 doses of, purportedly, insulin when he was having a diabetic episode by giving him a product
 28 called “Glutose 15” when he already was unconscious. He names as defendants state
 corrections department medical administrator Robert Bannister and the prison warden Dwight
 Neven, together with nurses Debra, Sonya, and Murphy, all in both their individual and official
 capacities. He seeks compensatory and punitive damages, and he further asks that the court
 review and investigate the medical procedures at the prison for administration of insulin.

In count I, plaintiff alleges initially that his “14th amendment rights were violated due to
 lack of medical training and medical care causing serious medical complication[s] do [sic] to
 over-dose of insulin treatment(s).” In the body of the count, however, he does refer further

1 to eighth amendment protections. Plaintiff alleges in pertinent part that nurse Debra did the
2 following:

3
4 Plaintiff Raven states that HDSP Nurse Debra
5 serious[ly] violated professional medical standards and medical
6 policy when she intentionally applied "Glutose" 15 which is used
7 to treat low blood sugar. However, HDSP Nurse Debra used her
own independent judgment by violating the warning label [sic] on
the Glutose 15 bottle [which] clearly states[: "do not administer
or apply to anyone who is unconscious or in diabetic shock or
coma by applying directly into patient's [sic] mouth.["]

8 #1-1, at 4.

9 In count II, plaintiff alleges that his "14th amendment rights to be treated equally was
10 seriously denied when HDSP Nurse Sonya[s] negligence caused significant injuries and
11 unnecessary infliction of pain." He alleges in pertinent part that nurse Sonya did the following:

12 Plaintiff Danny Raven states that HDSP Nurse Sonya
13 negligences [sic] by misrepresenting professional medical
14 standards when she and other HDSP nurses intentionally
15 disregarded medical label instruction on a "Glutose" 15 bottle that
16 warns[: "Do not apply or administer to anyone who is
17 unconscious.[" Defendant Sonya[s] lack of professional training
18 caused plaintiff to go into a serious life-threatening diabetic coma
because she allow[ed] with other HDSP nurses inappropriately
and forcefully applied Glutose 15 directly into plaintiff's mouth
while he was unconsciously [sic] in a diabetic coma. Plaintiff
alleges defendants["] deliberate indifference in their medical care
was a gross negligent [sic] and a result of serious injury causing
wanton infliction of pain by administering too much insulin.

19 #1-1, at 5.

20 In Count III, plaintiff alleges "that defendants Robert Bannister and HDSP Warden
21 Dwight Neven failures to supervise & oversee medical care violates due process." Plaintiff
22 alleges that Bannister and Neven "are legally liable [sic] for all HDSP medical staff who
23 intentionally use their own personal or independent judgment when treating and performing
24 medical care on chronic inmate(s) [sic] medical diagnoses." He further alleges that
25 "[d]efendant(s) [sic] medical malpractice actions based on alleged improper nursing care
26 made[s] [sic] defendant supervisor(s) [sic] liable [sic] for their negligence [sic] action
27 performed on plaintiff on the days [sic] in question." #1-1, at 6.

28 The complaint fails to state a claim upon which relief may be granted.

1 At the very outset, a federal constitutional claim by a state inmate for inadequate
2 medical care arises under the eighth amendment, not under the due process or equal
3 protection clauses of the fourteenth amendment. The due process and equal protection
4 clauses provide no protection in this factual context that is more extensive than and/or
5 operates independently of the eighth amendment. With particular regard to the equal
6 protection clause, not every dissimilar treatment of allegedly dissimilar individuals gives rise
7 to a constitutional equal protection violation. Moreover, with regard to the eighth amendment,
8 medical misdiagnosis, differences in medical opinion, medical malpractice, and negligence
9 do not amount to deliberate indifference to a serious medical need under the eighth
10 amendment. See, e.g., *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1992), *rev'd on*
11 *other grounds*, *WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997)(*en banc*); *Sanchez*
12 *v. Vild*, 891 F.2d 240, 241-42 (9th Cir.1989).

13 Accordingly, all of plaintiff's references in the complaint to the fourteenth amendment,
14 due process, equal protection, malpractice, misdiagnosis, failure to satisfy professional
15 medical standards, and negligence wholly fail to state a claim upon which relief may be
16 granted.

17 Rather, In order to state a claim for relief under the eighth amendment for deliberate
18 indifference to a serious medical need, the plaintiff must present factual allegations tending
19 to establish that the defendant official knew of and disregarded an excessive risk to inmate
20 health or safety. See, e.g., *Simmons v. Navajo County, Arizona*, 609 F.3d 1011, 1017-18 (9th
21 Cir. 2010). The official both must be aware of the facts from which the inference of an
22 excessive risk to inmate health or safety could be drawn, and he also must draw the
23 inference. *Id.* In other words, a plaintiff must show that the official was "(a) *subjectively*
24 *aware of the serious medical need and (b) failed adequately to respond.*" *Id.*, (quoting prior
25 authority, with emphasis in original).

26 Plaintiff has not alleged such facts in the complaint as to any defendant named in
27 counts I and II in the complaint. Plaintiff has not presented any actual factual allegations
28 tending to establish that any defendant was subjectively aware of an excessive risk to safety

1 from administering Glucose 15 to him and disregarded that risk. He instead has alleged a
2 failure to read and follow instructions through negligence and failure to satisfy professional
3 medical standards. Such alleged negligence, again, is not actionable under the eighth
4 amendment.

5 Moreover, count III also does not state a claim for relief against the supervisory officials
6 in their individual capacity. There is no *respondeat superior* vicarious liability under § 1983
7 for the alleged acts of subordinates, under the due process clause or otherwise. A
8 supervisory official may be held liable in his individual capacity only if he either was personally
9 involved in the constitutional deprivation or a sufficient causal connection existed between his
10 unlawful conduct and the constitutional violation. See, e.g., *Jackson v. City of Bremerton*, 268
11 F.3d 646, 653 (9th Cir. 2001). Here, plaintiff has not alleged a viable eighth amendment
12 violation in the first instance. He further clearly seeks to predicate liability on the part of
13 Bannister and Neven on their supervisory responsibility. He has not alleged any personal
14 involvement by either Bannister or Neven making them liable for the alleged acts of
15 negligence by the nurses.

16 Plaintiff also fails to state a claim for relief against defendant nurse Murphy. Plaintiff
17 presents no nonconclusory allegations of actual fact in the complaint with respect to nurse
18 Murphy. He states in the list of defendants that she “showed deliberate indifference when she
19 ignored doctor’s order[s] in treating chronic diabetic patience [sic].” He refers in passing in
20 count III – the *respondeat superior* count – to the alleged negligence of nurses Murphy, Debra
21 and Sonya. These formulaic conclusory assertions do not state a claim for relief against
22 nurse Murphy. Plaintiff must allege all of his claims against each one of the defendants within
23 the body of the counts in the complaint.

24 The complaint additionally fails to state a claim for relief against any defendant in their
25 official capacity. First, claims for monetary damages from the individual defendants in their
26 official capacity are barred by state sovereign immunity under the eleventh amendment. See,
27 e.g., *Taylor*, 880 F.2d at 1045; *Cardenas v. Anzal*, 311 F.3d 929, 934-35 (9th Cir. 2002).
28 Second, state officials sued in their official capacity for damages in any event are not

1 “persons” subject to suit under 42 U.S.C. § 1983. See *Will v. Michigan Dept. of State Police*,
 2 491 U.S. 58, 71 & n.10 (1989). Third, the injunctive relief sought by plaintiff is not available
 3 in a federal civil rights action. A federal court does not independently conduct investigations
 4 and reviews of state agencies practices, particularly with regard to the management of state
 5 prisons. Plaintiff instead must establish a right to specified injunctive relief tailored to a
 6 particular practice. See *generally* 18 U.S.C. § 3626(a). All official capacity claims as well the
 7 claim for injunctive relief thus fail to state a claim upon which relief may be granted.

8 The complaint therefore will be dismissed, subject to an opportunity to amend to
 9 correct the deficiencies identified herein, if possible.

10 ***Motion for Appointment of Counsel***

11 There is no constitutional right to appointed counsel in a § 1983 action. *E.g., Rand v.*
 12 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *opinion reinstated in pertinent part*, 154 F.3d
 13 952, 954 n.1 (9th Cir. 1998)(*en banc*). The provision in 28 U.S.C. § 1915(e)(1), however,
 14 gives a district court the discretion to request that an attorney represent an indigent civil
 15 litigant. See, *e.g., Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); 28 U.S.C. §
 16 1915(e)(1) (“The court may request an attorney to represent any person unable to afford
 17 counsel.”). Yet the statute does not give the court the authority to compel an attorney to
 18 accept appointment, such that counsel remains free to decline the request. See *Mallard v.*
 19 *United States District Court*, 490 U.S. 296 (1989). While the decision to request counsel is
 20 a matter that lies within the discretion of the district court, the court may exercise this
 21 discretion to request counsel only under “exceptional circumstances.” *E.g., Terrell v. Brewer*,
 22 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional circumstances requires an
 23 evaluation of both the likelihood of success on the merits and the plaintiff’s ability to articulate
 24 his claims *pro se* in light of the complexity of the legal issues involved. *Id.* Neither of these
 25 factors is determinative and both must be viewed together before reaching a decision. *Id.*

26 In the present case, plaintiff has demonstrated a sufficient ability to articulate his legal
 27 position on a lay basis, but his factual allegations do not state a claim upon which relief may
 28 be granted. It further is unlikely that plaintiff – whether with counsel or without – will be able

1 to establish a viable claim for relief based upon deliberate indifference in violation of the
 2 eighth amendment premised upon nurses providing an overdose of insulin by giving a patient
 3 Glutose 15. For purposes of review of the counsel motion only, not for screening of the
 4 complaint, the court takes judicial notice of the content of the National Institute of Health (NIH)
 5 web page concerning Glutose 15. Contrary to the plaintiff's apparently mistaken impression,
 6 the NIH webpage reflects that Glutose 15 is not insulin. It instead is a nonprescription sugar-
 7 based gel product. It thus would appear that plaintiff could not be subjected to an overly large
 8 dose of insulin by nurses administering Glutose 15. The labeling does caution against
 9 administering the product "to any person who is unconscious or unable to swallow." However,
 10 it would appear that this caution has nothing to do with the risk of administering too much
 11 insulin – given that Glutose 15 is not insulin – as opposed to other risks.¹

12 It accordingly would be a waste of time and resources to ask a private attorney to
 13 voluntarily take what very well may be a wholly baseless civil action. Plaintiff should pay heed
 14 to Rule 11(b)(3) of the Federal Rules of Civil Procedure if he pursues this matter further,
 15 which requires that all factual contentions that he makes either currently have evidentiary
 16 support or be capable of being supported by competent evidence. It appears at present that
 17 plaintiff perhaps misunderstands what Glutose 15 is and what it does.

18 IT THEREFORE IS ORDERED that the clerk shall file the complaint and that the
 19 complaint is DISMISSED without prejudice for failure to state a claim upon which relief may
 20 be granted, subject to leave to amend within **thirty (30) days** of entry of this order to correct
 21 the deficiencies in the complaint if possible.

22
 23 ¹See: <http://dailymed.nlm.nih.gov/dailymed/fda/fdaDrugXsl.cfm?id=24652>

24 The NIH webpage reflects, *inter alia*, that Glutose 15 is a nonprescription flavored oral glucose gel
 25 that delivers 15 grams of glucose and consists of "purified water, dextrose (d-glucose) USP 40% glycerin,
 lemon flavoring, and preservatives in an oral gel base."

26 The court, again, refers to the NIH webpage solely with regard to the counsel motion, not with regard
 27 to screening of the complaint. Moreover, nothing in this order implies that a request to counsel necessarily
 28 will be made if plaintiff presents claims that proceed to service following further screening. The court simply
 notes in denying the present motion for counsel that the action appears to be based upon a flawed factual
 premise.

1 IT FURTHER IS ORDERED that, on any such amended complaint filed, plaintiff shall
2 clearly title the amended complaint as an amended complaint by placing the word
3 "AMENDED" immediately above "Civil Rights Complaint" on page 1 in the caption and shall
4 place the docket number, **2:13-cv-01901-JCM-VCF**, above the word "AMENDED" in the
5 space for "Case No." Under Local Rule LR 15-1, any amended complaint filed must be
6 complete in itself without reference to prior filings. Thus, any allegations, parties, or requests
7 for relief from prior papers that are not carried forward in the amended complaint no longer
8 will be before the court.


9 IT FURTHER IS ORDERED that action on the pauper application (#1) is deferred at
10 this time.

11 IT FURTHER IS ORDERED that the motion (#3) for appointment of counsel is
12 DENIED.

13 If an amended complaint is filed in response to this order, the court will screen the
14 amended pleading before ordering any further action in this case.

15 If plaintiff does not timely mail an amended complaint to the clerk for filing, a final
16 judgment dismissing this action will be entered without further advance notice. If the
17 amended complaint does not correct the deficiencies identified in this order and otherwise
18 does not state a claim upon which relief may be granted, a final judgment dismissing this
19 action will be entered. In either event, the pauper application will be acted on in connection
20 with the judgment.

21 DATED: April 23, 2014.

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24 JAMES C. MAHAN
United States District Judge
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